Supreme Court, U.S.
FILED
NOV 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 87-570

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, and THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

v. Petitioners,

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF FRED A. RISSER, PRESIDENT OF THE WISCONSIN SENATE, AND TOM LOFTUS, SPEAKER OF THE WISCONSIN ASSEMBLY, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

RONALD L. SKLANSKY
Wisconsin Legislative Council
Room 147 North, State Capitol
Madison, Wisconsin 53702
(608) 266-1304

Counsel for Amici Fred A. Risser and Tom Loftus

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QUESTION PRESENTED

Whether members of an investigative committee of the State Legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their

investigative documents and reports served during an ongoing legislative investigation?

INTEREST OF THE AMICI CURIAE[1]

Amici are State Senator Fred A. Risser and State Representative Tom Loftus, President of the Wisconsin Senate and Speaker of the Wisconsin Assembly, respectively. Under Wisconsin Constitution, art. IV, s. 8, which provides in part that each House may determine the rules of its own proceedings, the President of the Senate generally represents and stands for the Senate and the Speaker of the Assembly generally represents and stands for the Assembly. (See 1987 Wisconsin Senate Rule 1 (3) and 1987 Wisconsin Assembly Rule 3 (1) (k).)

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[1]Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

In Wisconsin, the power to determine the state's policies and programs lies primarily in the legislative branch of state government. Comprised of 99 Representatives and 33 Senators, the Wisconsin Legislature virtually meets in continuous biennial session. (See Wisconsin Constitution, art. IV, ss. 1 and 2 and ss. 13.01 and 13.02, Stats.)

The full-time nature of the Wisconsin Legislature is expressed, for example, in the session schedule for the 1987-88 Biennium:

1/5/87	1987 Inauguration
1/6 to 1/26/87	Committee Work Period
1/27 to 2/6/87	Floorperiod Debate
2/9 to 3/16/87	Committee Work Period
3/17 to 3/19/87	Floorperiod Debate
3/20 to 4/20/87	Committee Work Period
4/21 to 6/26/87	Floorperiod Debate
6/29 to 10/5/87	Committee Work Period

10/6 to 10/30/87	Floorperiod Debate
11/2/87 to 1/25/88	Committee Work Period
1/26 to 3/25/88	Floorperiod Debate
3/28 to 5/16/88	Committee Work Period
5/17 to 5/19/88	Floorperiod Debate
5/20 to 12/30/88	Committee Work Period
1/3/89	1989 Inauguration

During floorperiod debate, the Wisconsin Legislature undertakes the archetypical legislative duty of consideration and passage of bills. During both the times of floorperiod debate and committee work periods, the Wisconsin Legislature reviews legislative proposals, reviews all administrative rules proposed by the executive branch, considers study proposals for major recodifications and modifications of the Wisconsin statutes and conducts committee investigations.

In order to maintain the continuity of the work of the Wisconsin Legislature, the State of Wisconsin has adopted constitutional provisions and has enacted statutes to preserve the integrity of the legislative process from undue interference. These policy statements can be found in the following provisions:

> 1. Wisconsin Constitution art. IV, s. 15. EXEMPTION FROM ARREST AND CIVIL PROCESS. Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.
>
> 2. Wisconsin Constitution art. IV, s. 16. PRIVILEGE IN DEBATE. No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.

> 3. Section 757.13, Stats. CONTINUANCES; LEGISLATIVE PRIVILEGE. When a witness, party or an attorney for any party to any action or proceeding in any court or any commission, is a member of the Wisconsin legislature, in session, that fact is sufficient cause for the adjournment or continuance of the action or proceeding and the adjournment or continuance shall be granted without the imposition of terms.

The business of the Wisconsin Legislature has been faced with actual and threatened interruption by subpoenas served both at the state and federal levels. For example, in Gaylor v. Risser, No. 78-C-146 (W.D. Wis.), the President Pro Tem and the Chief Clerk of the Senate both were served with subpoenas in a case challenging the practice of both Houses of the Wisconsin Legislature of authorizing members of the clergy to open each day's session with a prayer and compensating those clergy from public funds. The action was dismissed

in August 1983. Also, in Board of School Directors of the City of Milwaukee, et al. v. State of Wisconsin, et al., No. 84-C-877 (E.D. Wis.), attorneys for the plaintiffs threatened to serve various members of the State Legislature with subpoenas during a time of floorperiod debate in the current legislative session.

If the decision of the Third Circuit in this case remains in force, a United States Attorney will remain free to subpoena the records of a State Legislature and require members to appear before a grand jury at any time. Certainly in the case of the full-time Wisconsin Legislature, this sort of activity would cause great disruption in the state's business. If the Third Circuit decision is not reversed or modified, the interests of the Wisconsin

Legislature in the freedom of fact finding, legislative oversight and legislating will be adversely affected.

In presenting this statement of interest, amici are not advocating a state legislative system that is totally immune from federal process, especially in view of the Court's decision in United States v. Gillock, 445 U.S. 360 (1980). The State of Wisconsin does not favor a form of government that has no accountability. In fact, the state has a long tradition of open government, which is intended to ensure that the Legislature and its individual members and committees are accountable for their actions. (See, generally, ch. 19, Stats.) However, some form of state legislative immunity from federal process is necessary in order that the business of a State Legislature may proceed in a

relatively unimpeded manner and that State Legislators are accorded the respect to which they are entitled in our federal system of government.

A decision by the Court in this case will assist in clarifying the relationship between the need of federal prosecutors for information and state legislative immunity and prerogatives.

ARGUMENT

This brief fully incorporates the statement of the reasons for granting the writ made by the petitioners in their petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronald L. Sklansky
Counsel of Record for Amici
Fred A. Risser and Tom Loftus

Wisconsin Legislative Council
Room 147 North, State Capitol
Madison, Wisconsin 53702
(608) 266-1304